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Charles Eldering

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1 RECORD OF ORAL HEARING
2 UNITED STATES PATENT AND TRADEMARK OFFICE

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5 BEFORE THE BOARD OF PATENT APPEALS
6 AND INTERFERENCES
7 _____
8

9 *Ex Parte* CHARLES ELDERING
10 _____
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12 Appeal 2009-000502
13 Application 09/857,257
14 Technology Center 1700
15 _____
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17 Oral Hearing Held: June 23, 2009
18 _____
19

20 Before MURRIEL E. CRAWFORD, ANTON W. FETTING, and
21 JOSEPH A. FISCHETTI, *Administrative Patent Judges*.
22

23 ON BEHALF OF THE APPELLANT:

24 Andrew W. Spicer, Esquire
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30 The above-entitled matter came on for hearing on Tuesday, June 23,
31 2009, commencing at 9:00 a.m., at the U.S. Patent and Trademark Office,
32 600 Dulany Street, Alexandria, Virginia, before Daniel Greenwald, Notary
33 Public.

1 MS. BOBO-ALLEN: Good morning. Calendar No. 53. Appeal No.
2 2009-0502. Mr. Spicer.

3 JUDGE CRAWFORD: Good morning.

4 MR. SPICER: This is Mr. Kravitz (phonetic sp.) who is just
5 observing with me today, a colleague of mine.

6 JUDGE CRAWFORD: Begin whenever you're ready.

7 MR. SPICER: Okay, thank you, and good morning again, and I
8 appreciate your time this morning.

9 I'd like to begin just by really focusing on two primary aspects of
10 what we believe are important in this case with respect to the Examiner's
11 rejection the first of which is the teaching of a correlation factor or the lack
12 thereof, and in particular the transmission of that correlation factor prior to
13 receiving a bid from the advertiser. Now I realize that the Examiner relies
14 on the Kramer reference for the teaching of correlation generally and
15 therefore correlation factor, but regardless, the combination of Kramer and
16 Feezell does not teach any correlation factor that is based on both an ad
17 characterization and the consumer profile that the system obtains. Again,
18 while Kramer may teach the mathematical aspect of correlation and
19 attempting to determine what a consumer might desire, there is no
20 correlation between an ad characterization and consumer data as recited in
21 the claim, and therefore when combined with Feezell, the teaching just
22 simply isn't there.

23 The Examiner relies on various aspects of Feezell for -- to help
24 support this argument, one of which is this concept of valuation data that
25 Feezell's system provides to the system or to the advertiser, but the problem

1 with that is that all of the information that Feezell receives from the
2 advertiser occurs after the advertiser actually submits a bid. So --

3 JUDGE FETTING: I got the impression that the valuation data was
4 sent prior to the bid, because that's the information that was necessary in
5 order to come up with a bid.

6 MR. SPICER: Well, that's correct but the -- at most that valuation
7 data is about marketing and the ad slot itself. It's not a correlation factor
8 that is sent from the system or the advertising system to the buyer. So such
9 that when Feezell or in Feezell when the advertiser, or sorry, when the
10 system receives information from the advertiser, the first instance of that
11 information received back to the system is the bid itself. There's no *a priori*
12 knowledge by the system in Feezell of what the advertiser desires or the ad
13 characterization.

14 JUDGE FETTING: Okay. It seems as though the Examiner's
15 argument was in Feezell the system -- Feezell recognizes that the customer
16 needs some information with which to make a bid. They send what they call
17 valuation data which gives them something upon which to value the basis of
18 this timeslot, and the Examiner then appears to argue that, well, and Kramer
19 shows that perhaps in a different context it's even more important to show
20 some correlation between, in the case of Kramer, a customer and a product,
21 and the Examiner saying well, the product and advertisement are so closely
22 tied together that there's really not much distinction between a correlation
23 between a customer and a product and a customer and an advertisement so
24 that it's -- it would have been -- he's saying it's been predictable to
25 substitute Kramer's correlation for or in addition to the valuation data that
26 Feezell is sending prior to the bid.

1 MR. SPICER: I guess I didn't quite find the Examiner said that,
2 although I understand what you're saying. Even if that is true, and I would
3 respectfully dispute that that's the case, but even if that's true, there is still
4 then no -- this correlation or whatever occurs is still not -- might be with
5 respect to a consumer but is still not with respect to what the advertiser
6 wants.

7 So in our system, I guess maybe we should just step back for a
8 moment, and at a basic level there are three things that occurred here. The
9 first is the system gets an ad characterization from the advertiser, okay, and
10 then it produces a correlation factor, some information, for purposes of this
11 argument, that goes back to the advertiser. That information is a product of
12 the consumer, that is the ad slot or the person who's going to be watching
13 that ad slot and what the advertiser wants. And only then can the advertiser
14 make an informed decision or produce a bid.

15 So if as you're suggesting that, or what the Examiner is suggesting
16 occurs, it would still not be with respect to what the advertiser wants. There
17 would still be no *a priori* knowledge of here is my ad. Here is who I am.
18 Here is about my ad. Now take all this data and get me some very pointed
19 information about this particular slot that I might bid on it.

20 So -- and again I just go back to we dispute the notion of a correlation
21 factor generally, even in view of the combination going back to the
22 advertiser, but even if you concede that point, I think it's quite important to
23 note that what really goes back is not the product of what we're talking
24 about, and there is a fundamental distinction here. It's fairly important and
25 much more efficient and much more beneficial to the advertiser and the
26 seller I would imagine, for that matter, to have a really honed list of

1 advertisement slots and what those bids are going to be about before the
2 bid -- before the advertiser actually has an opportunity to bid on them.

3 So I think that that addresses valuation data, and similarly the
4 Examiner relies on broadcaster ID information and some information about
5 the slot contending that this constitutes a -- what the advertiser might want,
6 but again, that information does not come from the advertiser at all. That is
7 central to Feezell's system. Feezell obtains that information from the
8 program streamer, from information it has about the ad slots or pre-stored
9 data, not from the advertiser.

10 I would also point out that valuation data, generally speaking, is not
11 equivalent to consumer information or consumer data or information about
12 the consumer from a profile. The Examiner seems to suggest that, and we
13 would respectfully disagree.

14 An additional point with respect to receiving an ad characterization.
15 The Examiner -- and I would refer you to page 28 of the Examiner's
16 Answer, midway through that large paragraph there. But the Examiner, and
17 I quote, notes that a reasonable interpretation of an advertisement
18 characteristic is the type of advertisement where the advertised
19 company/product. Thus, Feezell teaches an advertisement characterization
20 by the mere knowledge of the potential buyer or product advertisement.
21 And you've suggested that that's with respect to Kramer. However, the
22 Examiner makes it quite clear that that's what Feezell is teaching, and I
23 simply find no such teaching in Feezell that the advertiser provides any such
24 information to the system. I grant you that the system might know who the
25 advertiser is, but that I think is about as far or as broad an interpretation you
26 can read in that and certainly not, you know, the Examiner is not entitled to

1 get that broad reading of that quote that I just provided you with, therefore,
2 you know, therefore finding that the system of Feezell receives an ad
3 characterization or the advertiser provides the Feezell system with an ad
4 characterization. That's just simply not true. At most, Feezell would know
5 who the name of the advertiser they're dealing with. But that in no way
6 implies that Feezell's system knows anything about the advertiser or the
7 advertisement that that advertiser wishes to insert into the slot that they're
8 going to bid on. That's just simply not in the art.

9 So really Feezell, and going back to those three points that I described
10 earlier, that is receiving an ad characterization, producing a correlation
11 factor and sending that back to the advertiser, and then allowing the
12 advertiser to send a bid, Feezell is essentially an opposite process, and
13 therefore I would submit that the combination of Feezell and Kramer is an
14 opposite process. Even if you take this correlation factor or whatever
15 mathematical function from Kramer and put it into Feezell, you are still
16 ending up with a situation where Feezell's system or the combination system
17 is producing options to the advertiser without having any knowledge of what
18 the advertiser might want.

19 JUDGE FETTING: Why do you say without having any knowledge
20 of what -- why the -- what the advertiser might want? I mean the fact that
21 they are, you know, submitting the opportunity for bids in certain timeslots
22 implies that they know in general what the advertiser wants.

23 MR. SPICER: Fair enough. I stand corrected. That might be a bit
24 broad of a statement, but you know, with respect to that particular
25 advertisement and with respect to that particular bid that they are -- well,
26 they may not even bid. That's part of the process and part of the point here.

1 Feezell's system does not know any -- again, I'll use the word "anything,"
2 but does not know -- have any specific knowledge of that advertiser's
3 desired advertisement.

4 I mean again, as an example, you know, Ford Motor Company might
5 be the advertiser. Okay, the Feezell system knows Ford Motor Company
6 and can certainly make an inherent assumption that the advertisement is
7 going to be about cars. But maybe Ford doesn't want to advertise about cars
8 that day, or it could be something peripheral to cars, and so the
9 advertisement that it wishes to bid on really is not directly related to cars.
10 So how is Feezell's system going to produce a pile of bids or slots to bid on
11 that is relevant to --

12 JUDGE FETTING: Yeah, it seems to me that the construction of that
13 phrase advertisement characteristic seems to be the -- where you and the
14 Examiner are in fundamental disagreement. The Examiner seems to be
15 taking a far broader construction, and I was -- I have -- perhaps I'm wrong,
16 but I did not see any lexicographic definition of that in the specification.

17 MR. SPICER: I don't have the specification in front of me, but I
18 believe that in the reply brief there is -- we make reference to the
19 specification at page 4, lines 11 through 14, and I, I don't have a copy of
20 that, a printed copy of that here with me right now.

21 JUDGE FETTING: Specification --

22 MR. SPICER: But I, I think the quote from there is that an ad
23 characterization may be -- and yes, there is a quote here in the reply brief on
24 page 4. A demographic characterization of an advertisement as well as a
25 product preference characterization of the advertisement.

26 JUDGE FETTING: So it's not a definition. It's just exemplary.

1 MR. SPICER: I think that's correct, yes.

2 JUDGE FETTING: Okay.

3 MR. SPICER: But you know, even coming back to some plain
4 language here, an ad characterization, I mean it is -- you could read that in a
5 number of different ways. I agree, and I think the specification provides
6 some guidance there. But to say that -- I mean Feezell has no teaching of
7 any -- receiving any ad characterization from an advertiser, and to say that
8 a -- in view of the fact that there's mere interactivity at some level between
9 the advertiser and the system in Feezell, to say that we then have an ad
10 characterization I think is overreaching. Again, I might know the identity of
11 the advertiser. Therefore, I might know the general advertisement space, but
12 even that's not fair to say in view of what we've claimed. We are looking
13 for a very specific advertisement characterization correlated with consumer
14 data to produce a correlation factor that goes back to the advertisement.

15 JUDGE FETTING: But you have not even indicated in the claim
16 whether it must be an existing as contrasted with a prospective
17 advertisement. So it could be a prospective advertisement characteristic
18 which again, knowing that you're dealing with Ford Motor Company, you
19 would know that prospectively it deals with cars.

20 MR. SPICER: I agree that it could be prospective or historical or
21 current or existing, what have you, but I don't -- I'm not quite sure that that's
22 the real point in that even if it is prospective to receive an ad characterization
23 about what the advertiser desires at that point in time, I --

24 JUDGE FETTING: Where does it say about what the advertiser
25 desires? Where is that in the claim?

1 MR. SPICER: Well, I think that the -- I agree it does not say that.
2 But when we have receiving an ad characterization from an advertiser
3 computer system, well, of course that is going to be what the advertiser --
4 what advertisement the advertiser wants to --

5 JUDGE FETTING: Characterization is a very broad term. In fact,
6 the -- providing the name of an advertiser is fairly characterized as that
7 advertisement. It's certainly a characteristic of the advertisement. It may
8 not be -- it may not describe the actual content, but you're not even saying
9 that the characterization has to characterize the content. You're simply
10 saying it has to characterize the advertisement in some way.

11 MR. SPICER: That's correct, and I think actually in that same section
12 of the reply brief we've made that point.

13 JUDGE FETTING: Okay.

14 MR. SPICER: You know, at, at most, that is what the Examiner can
15 say, at most, but I think going beyond that with respect to Feezell and
16 therefore the combination is -- I mean we, we respectfully would submit is
17 very broad.

18 So I -- really I would just come back to those three points then,
19 receiving an ad characterization, forming a correlation factor and sending
20 that to the advertiser prior to receiving all, and I would emphasize again all,
21 all prior to receiving a bid. So there is no *a priori* information coming from
22 the advertiser to the system.

23 With that, I don't have anything further but --

24 JUDGE FETTING: I don't have any further questions.

25 JUDGE CRAWFORD: Questions?

26 JUDGE FISCHETTI: I'm good.

- 1 JUDGE CRAWFORD: Thank you.
- 2 MR. SPICER: I certainly appreciate your time.
- 3 (Whereupon, the hearing concluded on June 23, 2009.)